IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No._____

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GAYLE ABRAHAM MORRIS,

Petitioner,

vs.

CASCADE COUNTY DETENTION CENTER, and EIGHTH JUDICIAL DISTRICT COURT, DEPT. A.,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Gayle Abraham Morris, individual and by and through his attorney of record, Nathan J. Hoines, and respectfully requests that the Supreme Court to issue a Writ of Habeas Corpus, pursuant to MCA §46-22-103, for the purpose of bail. The reason for said request is that the Petitioner has been denied bail pursuant to MCA §46-9-107 without a hearing or finding that the Defendant is likely to flee or pose the danger to the safety of any persons or the community. See Order Denying Motion for Release Pending Appeal, attached as Exhibit "A"

The Petitioner has been incarcerated in Cascade County Detention Center in protective custody, where he is only allowed out of his cell one (1) hour per day. The Petitioner has been incarcerated by the District Court Judge after pleading nolo contendere to the charges of Count I: Accountability to Prostitution, a misdemeanor, in violation of MCA §45-5-601(2009) and Count

II: Obstructing a Police Officer or other Public Servant, in misdemeanor, in violation of MCA §45-7-302(2009). See Change of Plea and Sentencing Order attached as Exhibit "B". The Petitioner was incarcerated even though the plea agreement called for a one (1) year sentence and $1,000.00 fine. See Plea Agreement attached as Exhibit "C".

AUTHORITY FOR WRIT:

The procedure for considering Petitions for Writ of Habeas Corpus is set forth in the statutes found at Title 46, Chapter 22, of the Montana Code Annotated that provides that when a person is in imprisoned or detained in custody on a criminal charge and denied bail, he or she is entitled to a Writ of Habeas of Corpus. MCA §46-22-103 (2009). MCA § 46-22-203 (2009), provides a writ will be granted without delay when properly submitted and MCA §46-22-205(2009) explains that the Writ must be directed to the person having custody of the person or on whose behalf the application is made and must command that the applicant be brought before the Judge before the Writ is returnable.

With regard to the bail pending appeal, MCA §46-9-107(2009), provides that the Court shall order the detention of a defendant found guilty of an offense who is awaiting imposition or execution of a sentence or a revocation of a hearing or who has filed an appeal unless the Court finds, that, if released, the defendant is not likely to flee or pose a danger to the safety of any persons or the community.

The Supreme Court reviews the district court's decision for denying an application for bail pending appeal for abuse of discretion. *State v. Ingraham*, (1997) 284 M 77, 945 P.2d 16, citing *Moore v. McCormick*,(1993) 260 M 305, 858 P.2d 1254, 1255.

FACTS:

The Petitioner, Gayle Abraham Morris, was charged by Information with Count I:

Promotion of Prostitution, a Felony, pursuant to MCA §45-5-602(2007). The Petitioner was arrested on July 9, 2009. That pursuant to the warrant of arrest the Petitioner was admitted to bail in the amount of $5,000.00 on various of conditions. See Warrant and Bail Conditions attached as Exhibit "D". The Petitioner was released upon his arrest after posting bail. During the pendency of the action, the Petitioner did not violation any of said bail conditions. On May 18, 2010, the parties reached an agreement and filed a plea agreement with the Court and vacated the trial and set a change of plea hearing in this matter. The Court set sentencing on June 3, 2010. On the sentencing date, the Deputy County Attorney filed a stipulated set of facts for which the Petitioner would plead nolo contendere to the charges of Count I: Accountability to Prostitution, a misdemeanor, and Count II: Obstructing a Police Officer or Other Public Servant, a misdemeanor. Pursuant to the stipulated facts, the Petitioner did not admit any of the facts that were true, but believed that the Deputy County Attorney could present such facts at trial. See Stipulation of Facts attached as Exhibit "E". At the change of plea hearing the Deputy County Attorney informed the Court he could not prove the original felony charge. After the Court accepted the amendment of the charges, the Petitioner's entry of nolo contendere the District Court Judge proceeded to sentencing.

No witnesses were called by the State or the Petitioner. Neither party presented evidence or recommended jail time. Pursuant to the plea agreement, the State recommended six (6) month suspended sentence on each count to run consecutive with $500.00 fine on each count. Counsel for the Defendant recommended a one (1) year deferred sentence and $500.00 fine. The Court sentenced the Petitioner to one (1) year in the Cascade County Jail, with no time suspended, and a fine of $1,000.00.

The Court entered a detention order and immediately incarcerated the Petitioner pursuant

to the detention order. See Detention Order attached as Exhibit "F".

The Petitioner filed a Notice of Appeal of his sentence on June 17, 2010, and filed with the Supreme Court on June 18, 2010. The Petitioner filed a Motion for Release pending Appeal on June 17, 2010. See attached Motion for Release, attached as Exhibit "G". The Court summarily denied the Petitioner's motion with no reasoning on June 18, 2010. The Court issued a Change of Plea and Sentencing order on or about June 21, 2010.

ABUSE OF DISCRETION BY DISTRICT COURT

In the present circumstances the Court abused its discretion because it had no hearing and made no findings. *Moore v. McCormick*,(1993) 260 M 305, 858 P.2d 1254, requires the district court to make specific findings, before denying bail pursuant to MCA §46-9-107, that the Petitioner is a flight risk or poses a danger to the community. The Court, in its one sentence denial of its Motion for Release Pending Appeal only states, "It is hereby ordered that the Defendant's Motion for Release Pending Appeal is denied." Based upon the fact that the Court did not set a hearing or make any specific findings of fact, it is a clear abuse of discretion.

FACTS SUPPORTING RELEASE PENDING APPEAL:

The Petitioner is 64 years of age, has resided in Cascade County for a majority of his life, except when he attended college in Billings, Montana, for a few years. See Exhibit "G". The Petitioner was a mayor for the City of Great Falls for two terms, from 1991-1995. Petitioner was also a Cascade County Commissioner from 1997-2002. The Petitioner owns real property in Cascade County, is an owner of a business and has ownership in a liquor license in Cascade County. *Id.* The Petitioner has a daughter and other family members that reside in Cascade County and has significant ties to the community. *Id.*

During the pendency of this action, the Court allowed the Petitioner to travel outside the

State of Montana from August 21, 2009 to August 28, 2009 to conduct business. See Exhibit "H". There is nothing in the record that the Petitioner had violated any of his bail conditions. The Petitioner has admitted to bail in the amount of $5,000.00, and has significant ties to the community, and is not a flight risk.

The Petitioner is also not a danger to the community. The Petitioner plead nolo contendere to Count I: accountability to prostitution. The stipulated facts state the Petitioner knew, or should have known, that prostitution was going on by female dancers at an establishment in which he was a proprietor. See Exhibit "E" Petitioner did not receive any proceeds from those activities. In regards to Count II: Obstructing a Police Officer or other Public Servant, the stipulated facts are that prior to the service of the search warrant, the Petitioner, while cleaning the establishment removed and/or destroyed condoms and wrappers hindering the enforcement of law enforcement. The Petitioner did not do so with the belief that an official proceeding or investigation was pending or about to be instituted. Clearly, under these facts the Petitioner is a non-violent offender and can not been seen as a danger to the community. The Petitioner has only a DUI conviction in 2003, and has no other record. The Petitioner had no new violations of law for 11 months, from the time of his arrest to his sentencing. The Petitioner has shown he is not a danger to the community by his life history as well as his compliance under the bail conditions.

IMMEDIATE RELEASE

The Petitioner respectfully requests that the Court grant his Writ of Habeas Corpus and immediately release him under his original $5,000.00 bail, under the same conditions of release.

Any justice of the Supreme Court has the power to admit the Petitioner to bail. MCA §46-9-201 in part provides....

"On appeal, a judge before whom the trial was had or a judge having the power to issue writ of habeas corpus may admit the defendant to bail...."

MCA §46-20-204(2) (2009), Stay of execution and relief pending appeal, provides:

If an appeal is taken, and the defendant is admitted to bail, a sentence of imprisonment must be stayed by the trial court.

In the present case, even though the Petitioner was not admitted to bail and was incarcerated, his bail has never been technically revoked by the district court. There is nothing in the record from the court's minutes from the sentencing hearing, attached as Exhibit "I", detention order, or the sentencing order revoking the Petitioner's bail. See Exhibit "B" Even though it could be presumed that it was the district court's intention to revoke bail, it has never been specifically ordered.

This is a distinguishing situation that was set forth in *Moore v. McCormick*,(1993) 260 M 305, 858 P.2d 1254, 1255, where the Court held that the Defendant's bail was revoked and he was not remitted to bail pending appeal and therefore MCA §46-20-204(2) (2009) did not mandate his release. This case is distinguishable from the present facts, based upon the fact that the Petitioner's bail has never been revoked.

In the present case, the Supreme Court should issue the writ regarding bail. If the Petitioner is denied bail his sentence could be completely served until the Supreme Court makes a determination of the legality and abuse of discretion. The Petitioner has been sentenced to a year (1) in the Cascade County Jail is akin to a four-year prison sentence because there is no possibility the Petitioner would receive any parole or reduction after serving one-fourth of his sentence. MCA §46-23-201 allows parole for person who has served one-forth of his sentence. This option is not available to the Petitioner in the Cascade County Detention Center.

The Petitioner would request that a Justice in the Supreme Court admit the Petitioner to bail and have a hearing on the return of said writ pursuant to MCA §46-22-304(2009). In the alternative, the Petitioner requests return of writ be in front of a Justice or full Supreme Court or another district court judge pursuant to MCA §3-2-212(2009). MCA §3-2-212 provides in part,

"Each of the justices of the supreme court may issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody and may make the writs returnable before the issuing justice, the supreme court, or any justice thereof or before any district court of the state or any judge thereof. Such writs may be heard and determined by the justice, the court, or the judge before whom they are made returnable."

The reason for this request is that the original district court judge sentenced the Petitioner to the maximum as prescribed by law even though the plea agreement recommended no jail time. The County Attorney's office presented no evidence and recommend no jail time. There is no evidence otherwise or no testimony or any other evidence presented. The Petitioner believes that the district court judge is biased against him.

Counsel for the Petitioner has been practicing in the excess of 18 years in the area of criminal defense and counsel has never seen an individual such as the Petitioner given the maximum sentence on two misdemeanors based upon the stipulated facts presented in this case. That even though the Petitioner's sentence is provided by law, it is so disproportionate to crime that is shocks the conscience and outrages the moral sense of community of justice. *State v. Bruns*, (1984), 213 M 372, 691 P.2d 817. The standard to determine whether a sentence is cruel and unusual punishment that would render it unconstitutional. *Id.*

Additionally, in the present case the sentence handed by the district court is arbitrarily without conscious judgment and exceeds the bound of reason. *State v. Ruiz*, (2005) 2005 MT

117, 327 Mont. 109, 112 P.3d 1001, citing *State v. Grindheim*, (2004) 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (citation omitted, for asserting the standard for abuse of discretion in sentencing).

The Petitioner respectfully requests that the Court not remand this case back to the district court or a hearing on the Petitioner's motion for release on bail. The district court made eight findings regarding the sentencing. See Exhibit "B" Based upon there were only stipulated facts, the findings are not supported by the evidence and it would be unfair for the Petitioner to be remanded back to the district court judge regarding any matter.

The Court can remand to a new judge under unusual circumstances. See *State v. Smith*,(1993) 261 Mont. 419, 863 P.2d 1000, citing *Coleman v. Risley* (1983), 203 Mont. 237, 249, 663 P.2d 1154, 1161. In *Coleman*, the Court set forth three factors that are to be considered for remanding to a new judge: 1) whether the original judge would reasonably be expected, upon remand, to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected; 2) whether reassignment is advisable to preserve the appearance of justice; 3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Coleman*, 633 P.2d at 1161.

In the present case, there was no evidence presented at sentencing and only stipulated facts in Exhibit "E" . The Court sentenced the Defendant based upon eight reasons:

1. The serious nature of the offense;
2. The harm to the community;
3. The harm to the young women who were brought into prostitution and the permanent damage to their lives;

4. The permanent damage to other people in like situations, such as other bar owners.
5. The ripple effect of the crime on the community;
6. The fact that the Defendant was the former Mayor of Great Falls and a former Cascade County Commissioner indicated that the Defendant should have known better;
7. The Defendant did not contest the charges and admitted the fact that supported the charges, indicating by his plea that there would be a high probability he would be convicted of the charges if he went forward with a jury trial;
8. This type of conduct is not acceptable in this community. (See Exhibit "B")

There is no evidence there is seriousness of the offense, harm to the community, that young women were brought into prostitution and damaged their lives, that there was any permanent damage to other people in like situations such as bar owners, and there was no rippling effect on the community.

The Court also specifically sentenced the Petitioner based upon him being a mayor and former Cascade County Commissioner. Pursuant to MCA §46-18-101(c), the Petitioner is specifically is not to be sentenced concerning offender's race, gender, religion, national origin, or social or economic status. In sentencing the Petitioner in this matter, the Judge specifically based his sentence on the Petitioner being a former public official. This should have been a mitigating factor instead of an aggravating factor. Petitioner should not be punished for his political views or service to the community. Especially when he did not use his political office affiliation concerning the crimes that were charged.

Finally, the district court sentenced the Petitioner based upon admitting the facts that support the charges. The Petitioner did not admit to the facts. Petitioner plead nolo contendere

pursuant to MCA §46-12-212(2)(2009), which provides a defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty or may, with the consent of the court and prosecutor enter a plea of nolo contendere to the offense if the defendant considers the plea to be in the defendant's best interest and the court determines that there is a factual basis for the plea. This is exactly what the Petitioner did and specifically did not admit the factual allegations, contrary to the court's sentencing order.

Based upon the district court sentencing the Petitioner to the maximum sentence, violating sentencing statutes and due process of law and failing to hold any evidentiary hearing, the district court would have a difficult time setting aside any biases he may have based upon the erroneous sentence and evidence. If this Court remands this matter to district court, a new judge is assigned to determine bail in this case. There are three (3) other district court judges in Cascade County and there would not be a waste of time or judicial process if this procedure is followed.

CONCLUSION:

Petitioner has been denied bail pursuant to MCA §46-9-107 without a hearing or finding that the Defendant is likely to flee or pose the danger to the safety of any persons or the community. The Petitioner, with one minor violation in 2003, is incarcerated in the Cascade County Detention Center in protective custody and is only allowed out of his cell one (1) hour a day. Based upon the charges and the facts, the sentence is cruel and unusual punishment. Petitioner specifically requests that the Court immediately release him pending appeal and have the writ returned in front of a Supreme Court Justice, or in the alternative have the writ returned in front of the full Court or new district court judge.

Dated this 24th day of June, 2010.

GAYLE ABRAHAM MORRIS, Petitioner

STATE OF MONTANA)
: ss.
COUNTY OF CASCADE)

On this 24th day of June, 2010, before me, the undersigned, a Notary Public in and for the State of Montana, personally appeared, Gayle Abraham Morris, known to me to be the person named in and whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first hereinabove written.

(NOTARIAL SEAL)

WENDY T. FISHER NOTARIAL SEAL STATE OF MONTANA

Notary Public for State of Montana
Printed Name Wendy T. Fisher
Residing at Great Falls
My Commission Expires: 01-22-2011

HOINES LAW OFFICE, P.C.

By
Nathan J. Hoines
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing PETITION upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Steve Bullock
Montana Attorney General
P.O. Box 201401
Helena, Montana 59620

Honorable Thomas McKittrick
Cascade County Courthouse
Great Falls, Montana 59401

Kory Larsen
Deputy County Attorney
121 4th Street North, 2nd Floor
Great Falls, Montana 59401

Dated this 24th day of June, 2010.

Wendy Fisher

Wendy Fisher, Paralegal